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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 252

THE UNITED STATES, PETITIONER

vs.

ARTEMUS C. WELLS, ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 3, 1930
CERTIORARI GRANTED OCTOBER 13, 1930

(35174)

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1 In the Supreme Court of the United States.

October Term, 1930

No. 252

THE UNITED STATES, PETITIONER

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS

Petition for a writ of certiorari to the Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case rendered April 7, 1930, and reported in 39 F. (2d) 998.

STATUTES INVOLVED

Section 402 of the revenue act of 1918, c. 18, 40 Stat. 1057, 1097, provides, in part, as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death

2 (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *".

STATEMENT

John W. Wells, a resident of Michigan, died testate on August 17, 1921, at the age of 73 years. (Finding 2.) The respondents are the executors of his estate. (Finding 1.) Within two years prior to his death decedent made three transfers of the aggregate value of $782,903 to his children without consideration. (Finding 35.) These transfers constituted approximately half and were a material part of his property. (Finding 36.) One transfer made in December, 1919, was of securities valued at $103,808, and the last two transfers made

in January, 1921, within eight months of his death, aggregated in value $679,095. (Finding 35.) The last of these transfers, amounting to $334,170, was given in final equalization of advancements made during the twenty preceding years to his five children and recorded in separate accounts kept by the decedent. (Findings 4 and 22.) His will, executed in a hospital in Chicago in August, 1920, five months prior to this equalization, provided that all advance-
3 ments should be charged to and deducted from his children's respective shares. (Finding 12.) At about the same time, in the hospital, decedent executed a postnuptial agreement with his wife to will her $100,000 in lieu of her statutory rights. (Findings 11 and 12.)

In April, 1920, eight months prior to the final transfer and equalization of the advancements to his children, decedent, while in California, became afflicted with ulcerative colitis, an aggravated form of dysentery. (Finding 8.) Decedent's father had died of chronic dysentery. (Finding 6.) Physicians advised decedent he had cancer of the intestines, and on July 9, 1920, he went to the Presbyterian Hospital in Chicago, where the disease was diagnosed as ulcerative colitis. (Finding 9.) He remained at the hospital two months and a half. (Findings 9 and 14.)

In November, 1920, decedent returned to the hospital for an operation for ethmoiditis to relieve his asthma (Finding 18), from which he had suffered for five years (Finding 5). During his ten-day stay the treatment for ulcerative colitis was continued. (Finding 18.)

In December, 1920, and January, 1921, decedent finally equalized the advancements to his children as above stated. (Findings 19 and 20.)

In April, 1921, while in California, the decedent had a recurrence of the ulcerative colitis, which was then suspected to be cancer of the intestines. An operation was advised. (Finding 29.) He re-
4 turned to the Chicago hospital in June, 1921, for the fifth time, suffering from a virulent attack of the same disease that did not respond to treatment. (Finding 30.) An abdominal operation to relieve the acute ulcerative colitis was performed on August 10, 1921. He died August 17, 1921. The death certificate gave as the cause of death "supperative colitis" and its "duration 1 yr." (Finding 31.)

The Commissioner of Internal Revenue determined that the three transfers were made in contemplation of death and included their value in decedent's gross estate. (Finding 32.) The respondents paid the tax assessed and upon rejection of their claim for refund, on the ground that the transfers were not made in contemplation of death (Finding 33), brought this suit in the Court of Claims. That court upon its special findings of fact, which did not include any finding as to whether the transfers in question were made in contemplation of death, rendered judgment, as a conclusion of law from such findings, in favor of the plaintiffs for the sum of $83,683.62, with interest, stating that in its opinion:

"Applying these facts to the rule that the term 'contemplation of death' does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death." (39 F. (2d) 998, 1011.)

QUESTION PRESENTED

Whether in determining the taxable estate of a decedent under section 402 (c) of the revenue act of 1918, the value of a material part of his property transferred by him to his children within two years prior to his death as advancements should be excluded as not having been made in contemplation of death because a reasonable fear of immediate death was not the direct and only cause of the transfer.

SPECIFICATION OF ERRORS

The court below erred—

1. In holding that "contemplation of death," as used in 402 (c) of the revenue act of 1918 is limited to "a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand."

2. In holding that "a transfer made in contemplation of death," as used in section 402 (c) of the revenue act of 1918, means a transfer of which a reasonable apprehension of death near at hand is the direct, animating, and only cause.

3. In giving judgment for the respondents.

REASONS FOR GRANTING THE WRIT

1. Error was committed by the Court of Claims in concluding and ruling as a matter of law from the facts found that the three transfers in question were not made in contemplation of death within the meaning of section 402 (c) of the revenue act of 1918.

The transfers in question were made within two years prior to August 17, 1921, the date of the decedent's death, and, unless shown to the contrary, they are deemed to have been made in contemplation of death within the meaning of the statute. The special findings of the court below do not include a finding that the transfers were or were not made in contemplation of death. It is sub-
6 mitted that the court erred in deciding as a conclusion of law upon the special findings of fact that the respondents were entitled to recovery in this case.

If the court correctly stated the rule, its conclusion that the transfers were not in contemplation of death undoubtedly finds adequate

support in the special findings of fact and in the inferences deductible from these findings. But unless contemplation of death means expectation of death near at hand from an ascertained cause, we submit that no such conclusion can be predicated upon the findings.

The fact that the transfers were made to carry out the decedent's policy for the distribution of a material part of his property among his children before his death in the form of "advancements" is entirely clear. (Finding 4.) The decedent and the court below specifically designate the gifts and transfers in question as "advancements" by the decedent to his children. (Findings 4, 12.) His will, executed on August 18, 1920, contained the following clause: "Provided, however, that the amounts shown to be due me from each of my children severally in accordance with my books at the time of my death, shall be considered advancement made by me to them from time to time and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares." (Finding 12.) The property was carefully divided equally among the children and interest was charged on the father's books
7 against all advancements so made in order that, in the long run, each child should share equally in the portion of the father's estate that he was distributing among them during his life. It is submitted that regardless of the decedent's condition of health at the time of the advancements to his children, the very nature of the advancements and the manner and circumstances under which they were made indicate conclusively that the decedent had in contemplation the situation that would exist upon his death as respects the devolution of his estate. It is of the very nature of an advancement that it is made in anticipation of the parent's death. The language above quoted from decedent's will leaves no doubt that the advancements here in question were regarded by the decedent as in effect testamentary dispositions.

2. Error was committed by the court below in applying to the facts found "the rule that the term 'contemplation of death' does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, * * *" (39 F. (2d) 998, 1011.)

It is submitted that such a rule narrows the operation of the statute to such an extent as to defeat its purpose and is in
8 conflict with other Federal decisions on the point. The purpose of section 402 (c) of the revenue act of 1918, in taxing transfers of property of the kind here involved, is to avoid the loss of revenue which otherwise would result by the withdrawal of property from the operation of the provisions of the statute taxing transfers by succession or testamentary disposition. That Congress regarded the presumption at the end of section 402 (c) as vital is

shown by the fact that the revenue act of 1926 contains the same presumption, now irrebutable, in the form of a rigid rule of law.

The statute here in question provides that a transfer of a material part of the decedent's property in the nature of a final disposition or distribution made within two years prior to his death shall, unless shown to the contrary, be deemed to have been made in contemplation of death. The rule laid down by the court below adds two further criteria not in the statute and inconsistent with it, namely: That there be fear of death near at hand and that the only cause of the transfer be such fear. We submit that one may contemplate death several years prior to its occurrence. Indeed, transfers made in contemplation of death at any time whatsoever are subject to the tax. (Cf. Shwab v. Doyle, 258 U. S. 529, 535–536.) Moreover, a gift prompted by a desire to evade the inheritance tax or by other moving causes that may be coupled with the fear that death is near at hand, is no less made in contemplation of death within the meaning of the taxing act, because such desire or other moving cause contributes to cause the transfer to be made. Indeed,
9 other motives always animate the donor in disposing of his property.

In Shwab v. Doyle, 269 Fed. 321 (C. C. A. 6th Circuit), reversed in 258 U. S. 529, on other grounds, the plaintiff in the District Court requested that the court charge:

"The words 'in contemplation of death' do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril." (P. 327.)

The court in the Shwab case refused plaintiff's request and instructed the jury in part as follows:

"Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer." (P. 328.)

The Circuit Court of Appeals in sustaining the trial court said:

"It may be conceded that plaintiff's requested instruction would have been proper as applied to a gift claimed to have been made causa mortis—when the grantor was in a dying condition. But the instant case presented no such issue or claim. The transfer in question was an absolute gift inter vivos, claimed by the Government to have been testamentary in character." (Page 328.)

In Rengstorff v. McLaughlin, 21 F. (2d) 177, 178 (D. C. N. D. Calif.) the court said in its opinion:

"A transfer, in order to be characterized as one 'in contemplation of death,' need not be one made in anticipation of imminent

demise as the result of an existing illness or malady, as in
10 the case of a gift causa mortis. On the contrary, it is possible that a person of comparative youth, enjoying good health, may nevertheless make a transfer of property 'in contemplation of death,' within the meaning of that phrase."

With such statements of the law the decision of the Court of Claims in the instant case is clearly in conflict. It is submitted that transfers made in contemplation of death within the meaning of the taxing act here involved are not confined to transfers made under the conditions of gifts causa mortis.

CONCLUSION

There has been no decision in point by this court. There are many tax cases now pending involving large sums of taxes collected which the United States must refund if the decision of the court below is a true statement of the law. Because of the importance of the question involved in the administration of the tax laws and the conflict of decisions thereon, it is submitted that the decision of the court below should be reviewed by this court.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1930.

11 In the Court of Claims of the United States

No. H-321

ARTEMUS C. WELLS, RALPH W. WELLS, DANIEL WELLS, EDNA W. Walsh, and Florence W. Law, executors of the estate of John W. Wells, deceased, plaintiffs.

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed August 3, 1927

To the Honorable the Court of Claims:

The plaintiffs, Artemus C. Wells, Ralph W. Wells, Daniel Wells, Edna W. Walsh, and Florence W. Law, executors of the estate of John W. Wells, deceased, through their attorneys, W. W. Spalding and Robert A. Littleton, by this their petition herein, respectfully show:

12 I. At all times herein mentioned plaintiffs were and are the executors of the estate of John W. Wells, deceased, as will more fully appear from an order or decree of the probate court of

Menominee County, State of Michigan. An exemplified copy of said order or decree evidencing the appointment and qualification of plaintiffs, as executors of said estate, is here produced and shown to the court, made a part of this petition, and marked Exhibit "A" for identification. The plaintiffs maintain this action in their capacity as executors of the estate of John W. Wells, deceased.

II. Plaintiffs have a just claim for the recovery from the United States of $83,683.62, with interest from the 27th day of May, 1924, being an amount paid by plaintiffs to the collector of internal revenue for the district of Grand Rapids, State of Michigan, on the 27th day of May, 1924. The said amount of $83,683.62 was paid by plaintiffs under protest and duress, and was claimed to have been collected from plaintiffs by the collector of internal revenue at Grand Rapids, Michigan, as additional estate taxes under the provisions of section 401 of the revenue act of 1918. Plaintiffs further claim interest at 6 per cent per annum on said amount of $83,683.62, from the date of payment on the 27th day of May, 1924, to the date on which refund is made.

The provisions of law under which said assessment and collection of additional estate taxes were claimed to have been made by the said collector of internal revenue (which amount of $83,683.62
13 the said collector has paid into the Treasury of the United States) are sections 401 and 402 (c) of the revenue act of 1918. The provisions of the law under which plaintiffs maintain this action are sections 401 and 402 (c) of the revenue act of 1918, and sections 3220 and 3226 of the Revised Statutes, as amended.

III. Within the time allowed by law plaintiffs duly filed with the collector of internal revenue at Grand Rapids, Michigan, a claim for the refund, with interest, of $88,299.77, the amount paid to the defendant as aforesaid, as additional estate taxes on the estate of John W. Wells, deceased (plus interest paid), and as the basis of said claim stated that the value of the property on which said additional estate taxes were computed, assessed, and collected, was no part of the estate of the said John W. Wells passing at the date of his death.

Said claim for refund was originally for the amount of $88,299.77, which was allowed by the Commissioner of Internal Revenue in the amount of $4,616.15, and rejected in the amount of $83,683.62. Said claim for refund was rejected for the amount of $83,683.62 on the alleged ground that the value of the property on which additional estate taxes had been assessed and collected was a part of the taxable estate passing at the date of the death of John W. Wells, under the provisions of section 402 (c) of the revenue act of 1918, because, as claimed by said commissioner, said property was transferred by the decedent in contemplation of death. All said estate taxes paid by the plaintiffs as aforesaid are still retained by the defendant.

14 IV. Plaintiffs would show the court that the decedent, John W. Wells, died August 17, 1921, and that they are the duly nominated, appointed, and qualified executors of his estate. That

in the estate tax return, filed by them in 1922, they reported a net taxable estate of $883,485.08, on which they paid in 1922 estate taxes of $42,178.81. In 1923 an audit of said estate tax return was made by the Bureau of Internal Revenue, and on the basis of said audit there was proposed, determined, and assessed an additional estate tax against plaintiffs in the amount of $175,278.48, which amount, under claims for abatement and refund, was reduced to $83,683.62—the amount now claimed as a refund, and sued for in this case.

In so determining the estate tax liability of said estate, the Commissioner of Internal Revenue added to the taxable estate reported by plaintiffs in their said return certain properties transferred by the decedent to his sons and daughters, on the alleged ground that the transfer of said properties was made by decedent in contemplation of death within the meaning of section 402 (c) of the revenue act of 1918. Said properties, the person to whom transferred, the month and year in which the transfers were made, and the value of the property were as follows:

(a) 1,280 shares of stock in J. W. Wells Lumber Company to Daniel Wells and Artemus C. Wells in December, 1919, and December, 1920	$103,808.00
15 (b) 69,985 shares of stock in Girard Lumber Company transferred to decedent's children at various times during the year 1920	462,190.50
(c) 3,713 shares of stock in Heywood Wakefield Company, transferred to decedent's wife and children in accordance with trust agreement dated January 1, 1921	371,300.00

The total value placed on this property by the Commissioner of Internal Revenue at which it was included in the taxable estate of the decedent for estate tax purposes was $937,307.50.

In determining that said property should be added to the reported taxable estate, the Bureau of Internal Revenue erred to the prejudice of plaintiff's substantial rights.

The transfers of said properties were not made by the decedent in contemplation of death, nor were said transfers intended to take effect in possession or enjoyment at or after death of the decedent. Plaintiffs will show to the court that said transfers were made in good faith and not for any purpose within the meaning of section 402 (c) of the revenue act of 1918. Plaintiffs will also show to the court, and it is true, that at the time said transfers were made the transferor was well, active in business, and entertained no thought of death in the near future, and that the motivating cause of said transfers was not contemplation of death.

16 By making said additions to the taxable estate the Bureau of Internal Revenue overstated the value of the taxable estate in the amount of $937,307.50, and thereby overstated the correct estate tax liability in the amount of $88,299.77, including interest, as hereinbefore stated.

V. Plaintiffs therefore ask for the refundment of $83,683.62, plus interest on same from the date of payment until refunded to plaintiffs.

VI. This suit is brought subsequent to the rejection of said claim for refund, and within five years from the date of the payment of said alleged additional estate taxes.

VII. Plaintiffs and their decedent have at all times borne true allegiance to the Government of the United States, and have not, in any way, voluntarily or otherwise, aided or abetted or given encouragement to rebellion against such Government; and are and always have been the sole and absolute owner of the claim herein presented, and have made no assignment or transfer of said claim, nor any part thereof, nor any interest therein; and are justly entitled to the amount herein claimed from the United States, after allowing all just credits and set-offs; and no action has been had on this claim in Congress nor by any of the departments, except as hereinbefore stated.

VIII. Plaintiffs believe the facts as hereinbefore stated to be true.

17 Wherefore the plaintiffs pray judgment against the United States of America upon the facts and law hereinbefore set forth for $83,683.62, with interest, and for such other relief as may appear equitable and proper as this cause progresses.

ARTEMUS C. WELLS,
RALPH W. WELLS,
DANIEL WELLS,
EDNA W. WALSH, and
FLORENCE W. LAW,
Executors of Estate of John W. Wells, Deceased.
By A. C. WELLS,
Acting for Himself and Co-executors.

W. W. SPALDING,
ROBERT A. LITTLETON,
Attorneys for Plaintiffs,
Woodward Building, Washington, D. C.

[*Duly sworn to by Artemus C. Wells. Jurat omitted in printing.*]

19 *Exhibit "A" to petition*

(Copy)

STATE OF MICHIGAN:
The Probate Court for the County of Menominee.

At a session of said court, held at the probate office in the city of Menominee in said county, on the 26th day of September, A. D. 1921.

Present, Hon. John Stiles, judge of probate.

In the matter of the estate of John W. Wells, deceased.

This day having been appointed for hearing the petition of Ralph W. Wells praying for the probate of the instrument heretofore filed in said court, purporting to be the last will and testament of said deceased and due notice of the hearing on said petition having

been given as directed by said court, the said petitioner appeared in person.

It appearing to the court from the testimony of W. E. Hallenbach, one of the subscribing witnesses to said instrument, that said deceased signed and duly executed said instrument as and for his last will and testament in the presence of sufficient and competent witnesses, and that said witnesses attested and subscribed said instrument as subscribing witnesses thereto, at the request of said deceased in his presence, and in the presence of each other, and that said deceased at the time of the execution thereof was of full age and sound mind, and under no restraint or undue influence;

It further appearing, that said deceased died on the 17th day of August, A. D. 1921, and at the time of his death was an inhabitant of the city of Menominee in said county, and that said instrument has been duly proved, and ought to be allowed as the last will and testament of said deceased;

It is ordered, that said instrument be and is hereby allowed and admitted to probate as the last will and testament of said deceased, and that the same be recorded as required by law;

It is further ordered, that the execution of said will be committed, and the administration of the estate of said deceased be granted to Florence W. Law, Daniel Wells, Artemus Carter Wells, Edna W. Walsh, and Ralph W. Wells.

(Signed) JOHN STILES,
Judge of Probate.

Exemplification

I, Ernest A. McCue, of the city of Menominee, County of Menominee, State of Michigan, a notary public in and for said county, do hereby certify that I have compared the above copy of order admitting will to probate with the original thereof and have found the same to be a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Menominee, this 8th day of June, 1922.

[SEAL.] (S.) ERNEST A. MCCUE.

My commission expires June 17, 1925.

STATE OF MICHIGAN:
The Probate Court for the County of Menominee.

In the matter of the estate of John W. Wells (deceased).

I, Katherine Stiles Laughton, register of said court, having the legal custody of the files and records thereof, do hereby certify that I have compared the attached copy of will, order admitting will to probate, certificate on probate with the original thereof on file in said court, and have found the same to be a correct transcript therefrom, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Menominee in said county, this 27th day of September, A. D., 1921.

(Signed) KATHERINE STILES LAUGHTON,
Register of Probate.

Exemplification

I, Ernest A. McCue, of the city of Menominee, county of Menominee, State of Michigan, a notary public in and for said county, do hereby certify that I have compared the above exemplification of record in the matter of the estate of John W. Wells, deceased, with the original thereof and have found the same to be a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Menominee, this 8th day of June, 1922.

[SEAL.] (Signed) ERNEST A. MCCUE.

My commission expires June 17, 1925.

22 Know all men by these presents, that I, John W. Wells, of Menominee City and County, in the State of Michigan, being of full age and of sound disposing mind, memory, and understanding, nevertheless not unmindful of the uncertainties of human life do make, publish, and declare this my last will and testament, in the manner following, hereby revoking all former wills by me made.

1. I will and direct that as soon as may be after my decease, all of my just debts, if any there be, and the expenses of my last sickness and funeral and of administering upon my estate be paid out of my personal estate.

2. I give and bequeath unto my wife, Katherine Wells, for her absolute use one hundred thousand dollars ($100,000) in money, five thousand dollars ($5,000) thereof to be paid to her within thirty days after my decease and five thousand dollars ($5,000) at the end of each succeeding thirty days thereafter until the unpaid balance can be paid to her entire or in larger portions, without material injury to my estate, in discretion of my executors; said legacy to be wholly paid within one year and a day after my decease. I also give, devise, and bequeath to my said wife, the use during her life of the family homestead, situated at No. 1207 Main Street, in Menominee aforesaid, and the land and premises occupied in connection therewith. I also give and bequeath to my said wife, for her absolute use the wearing apparel and personal ornaments whereof I died possessed; also the household furniture, furnishings, equipment, books, works of art, ornaments, musical instruments or appliances, music and all other chattels or effects, together with the fuel, housekeeping provisions and other consumable stores
23 which shall at my decease be in or about my said homestead, except money and securities for money, evidences of debt and of title, and accounts, vouchers, and manuscripts; and excepting stocks, bonds, and securities. I also give and bequeath to my said

wife, for her absolute use all horses, cows, and other animate property, and all carriages, cutters, sleighs, automobiles, and other vehicles, and all barn or garage tools, utensils, implements, appliances and equipment which shall at my decease be owned by me for my personal or family use, whether the same be then upon my homestead premises or elsewhere; all consumable stores then at the barn on said homestead premises. The provisions for my said wife in this item shall be given to and received by her in lieu of and to the exclusion of any and all dower or right of dower in my real estate, and all allowances, distributive share, all interests of every kind in my estate.

3. All the rest and residue of my estate, of every name and nature, and wheresoever the same may be situated, I give, devise, and bequeath share and share alike unto my children, Florence Ada Law, Daniel Wells, Artemus Carter Wells, Edna Ethel Wells, and Ralph Waldo Wells and to heirs of any thereof, deceased, according to the right of representation, and to any child or children thereafter born by me begotten. To have and to hold the same, to my said children, and the heirs of any thereof, deceased, according to the right of representation, and to their respective heirs and assigns, forever. Provided, however, that the amounts shown to be due me from each of my children severally in accordance with my books at the time of my death shall be considered advancements made by me to them from time to time, and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares.

24 4. Reposing entire confidence in the ability and integrity of my children, I appoint the said children executors of this will, and I request that they and each thereof, be not required to give any bond or bonds for the faithful execution of said trust; and I hereby authorize and empower them and the survivors or survivor thereof, or the majority of them or of the survivors to compound or compromise any claim or demand that may be either for or against my estate, or to extend the time of payment of any note, claim, or demand that may be either for or against my estate. And I also authorize them or the survivors or survivor thereof, or the majority of them, or of such survivors, to negotiate, grant, bargain, sell, and convey any part of my estate or interest therein, without application to or the intervention of any court.

It is my desire that my estate be administered, and the residue thereof distributed without unnecessary delay, and with as much dispatch as may be used without detriment to the full preservation and realization thereof.

In witness whereof I have hereunto set my hand and seal this 18th day of August A. D., 1920.

JOHN W. WELLS. [SEAL.]

Witnesses:
A. C. WELLS.
W. E. HALLENBECK.

The above and foregoing instrument consisting of four pages, including this page, was on the day of the date thereof, signed, sealed, published, and declared by the said John W. Wells to be his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses thereto.

25 _____ _____ of _____ _____.

_____ _____ of _____ _____.

_____ _____ of _____ _____.

Exemplification

I, Ernest A. McCue, of the city of Menominee, county of Menominee, State of Michigan, a notary public in and for said county, do hereby certify that I have compared the above last will and testament of John W. Wells, deceased, with the original thereof, and have found the same to be a correct transcript therefrom and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Menominee, this 8th day of June, 1922.

[SEAL.] (S.) ERNEST A. McCUE.

My commission expires June 17, 1925.

Know all men by these presents, that we, Katherine J. Wells, Florence W. Law, Daniel Wells, Edna W. Walsh have made, constituted and appointed, and by these presents, do make, constitute, and appoint Ralph W. Wells and Artemus C. Wells our true and lawful attorneys for us and in our name, place, and stead, giving and granting unto Ralph W. Wells and Artemus C. Wells, said attorneys, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the matter of the estate of John W. Wells, as fully to all intents and purposes, as we might or would do if personally present, with full power to substitution and revocation, hereby ratifying and confirming all that Ralph W. Wells and Artemus C. Wells, said attor-

26 neys or their substitutes shall lawfully do or cause to be done by virtue hereof.

In witness whereof, we have hereunto set our hand and seal the 8th day of October, A. D., 1921.

KATHERINE J. WELLS.
FLORENCE W. LAW.
DANIEL WELLS.
EDNA W. WALSH.

Subscribed and sworn to before me a notary public in and for the county of Menominee, Michigan.

ERNEST A. McCUE,
Notary Public, Menominee County, Mich.

My commission expires June 17, 1925.

I hereby certify the foregoing to be a true copy of power of attorney executed by Katherine J. Wells, Florence W. Law, Daniel Wells, and Edna W. Walsh.

[SEAL.] (S.) ERNEST A. MCCUE,
Notary Public, Menominee County, Mich.

My commission expires June 17, 1925.

27 II. *General traverse*

Filed Sept. 12, 1927.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

D. E. K.

III. *Argument and submission of case*

On February 17, 1930, this case was argued and submitted on merits by Mr. W. W. Spalding, for plaintiffs, and by Mr. William T. Sabine, for defendant.

28 IV. *Special findings of fact, conclusion of law, and opinion of the court by Williams, J.*

Filed April 7, 1930

Mr. W. W. Spalding for plaintiff. Mason, Spalding & McAtee, were on the brief.

Mr. Wm. T. Sabine, jr., with whom was Mr. Assistant Attorney General Herman J. Galloway, for the defendant. Mr. Fred K. Dyar was on the brief.

The sole question to be determined by the court in this case is whether or not transfers by gift made by a decedent within two years prior to his death, of his property, are transfers of property in contemplation of death within the meaning of the revenue act of 1918. (40 Stat. 1057.)

This case having been heard by the Court of Claims, the court, upon the report of a commissioner and the evidence, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiffs are the duly appointed, qualified, and acting executors of the estate of John W. Wells, deceased.

2. Said John W. Wells, a resident of Menominee, Michigan, died at the Presbyterian Hospital, Chicago, Illinois, on August 17, 1921, at the age of 73 years and 5 months, following an operation decided

upon as an extreme effort to save him from death resulting from ulcerative colitis. Dr. Ralph Brown, an attendant physician at the Presbyterian Hospital, had been treating him for the disease. On August 17th, the day of decedent's death, Dr. Brown signed decedent's death certificate. The original certificate is filed with the department of health, bureau of vital statistics, Chicago, Illinois, dated August 17, 1921. In the certificate he certified that the cause of Mr. Wells' death was suppurative colitis and that its duration had been one year.

3. Decedent left surviving him a widow, Katherine Wells (who was his second wife, but who died before the institution of this action) and five children by his first wife, viz., Daniel Wells, Artemus C. Wells, Ralph W. Wells, Mrs. Florence Law, and Mrs. Edna Walsh. While still a young man the decedent moved from Iowa to Michigan, where he became interested in the business of acquiring and selling timber lands and that of manufacturing lumber, businesses in which he continued to the time of his death. His home was at Menominee, Michigan. Many years ago he organized the Girard Lumber Company and the J. W. Wells Lumber Company, of Menominee, Michigan, and became the principal owner of their respective shares of stock. To the management of these companies he devoted the greater part of his business activities.

4. As far back as 1901 the decedent began the making of advancements of money or other property to his children. He kept a set of books on which he charged to the several children some, but not all, of the amounts transferred to them. These books of account, which are wholly in the decedent's handwriting, record many items of varying amounts—from a dollar or two to more than thirty thousand dollars—to represent advancements by the decedent to his children in 1901 and subsequent years. On the credit side of the several accounts of the children were entered repayments by them to him.

For a considerable period of time the decedent was engaged in the lumber business with the late Senator Isaac Stephenson, who died in or about the year 1918. It appears that Mr. Stephenson's policy in the matter of gifts or advancements to his children was not so liberal as that of the decedent. About the time of Mr. Stephenson's death this subject was discussed by the decedent with business associates. The decedent expressed it as his opinion that the proper thing for a man of wealth to do was to give his children substantial sums of money during his lifetime while he could advise with them as to its proper use. He further expressed the opinion that some wealthy men who had recently died leaving estates had made a great mistake, and informed his friend Blom, "I am making distribution from time to time of part of my property to see what my children will do during my lifetime, and I will then know when my time is up what I ought to do with the balance."

He frequently expressed his opinion that his friend, Senator Stephenson, had made a big mistake in not distributing his property to his children while he was alive to help them handle it properly and said "that is not my policy."

5. On May 28, 1918, Mr. Wells, the decedent, went for the first time to the Presbyterian Hospital in Chicago to be treated for asthma, and remained there eleven days until June 8, 1918. The hospital records show that at that time he gave the following history of his asthmatic disease:

"About four years ago I began to have attacks (lasting from two to ten days) of dyspnoea, especially at night. Would have to sit up to breathe. (Would fill up, if he would lie.) Expectorate considerable quantities thick mucus, greyish or yellowish. 'Seems to come up from lungs.' Says that at onset it seemed more like cold in the head. Was operated; had part of turbinate removed and then felt better for about one and one-half years. Lately has been having more trouble; coughs a good deal. Attacks are more frequent and come on with slight colds."

6. Mrs. Florence W. Law, one of decedent's daughters, testified that decedent's father died in the Civil War; that he was injured in the Civil War. The records of the Presbyterian Hospital, however, show that decedent, himself, in giving his family history on May 28, 1918, told the hospital authorities that his father had "died of chronic dysentery." With the exception of his father the decedent's family appears to be a long-lived one.

7. In 1918, the decedent advanced to three of his children, Ralph, Mrs. Walsh, and Mrs. Law, certain shares of stock in the Dunbar & Wauzeka Railway Company for which he charged each in the equalization hereinafter mentioned $23,462.

On December 24, 1919, decedent transferred to his son Artemus C. Wells, 343 shares of the stock of the J. W. Wells Lumber Company, and to his son Daniel Wells 73 shares of the stock of the same company. By reason of a stock dividend subsequently declared these 416 shares were increased to 1,280 shares at the date of decedent's death. About a year after these transfers, in the latter part of December, 1920, in the process of equalizing the sums advanced to his children, as hereinafter set forth, he charged his son Artemus with $99,180 and his son Daniel with $19,980 on account of these transfers. Their stipulated aggregate value as of the date of his death was $103,808.

8. About the middle of April, 1920, decedent, while in California, began to be afflicted with ulcerative colitis. This disease is "a condition in which the large intestine becomes inflamed. It involves chiefly the mucous membrane lining of the bowel. Ulceration occurs, quantities of pus and blood are poured out, usually fever, usually more or less abdominal pain, and loss of weight. It is what the layman refers to as dysentery—one form of dysentery." It is a curable disease. About eighty to eighty-five per cent of the cases are cured.

9. In June, 1920, decedent had been advised by physicians in California that he was suffering from cancer of the intestines. Early in the following July decedent left California and, with his wife, went to Chicago, Illinois, where, upon their arrival on July 9, 1920, they were met at the train by his son, Artemus, and his friend, M. B. Lloyd. They all went together to the Presbyterian Hospital. At the hospital decedent was examined by Dr. Ralph Brown, a specialist in bowel disease. Dr. Brown diagnosed the case as ulcerative colitis and explained to decedent in detail the nature of his ailment. Dr. Brown, reading in part from the hospital record, described his condition, as follows:

"Three months prior to his coming for advice on the 9th of July, 1920, he began having diarrhea, resulting from what he believed to be ptomaine poisoning. One evening for dinner—I am quoting from the hospital records written at the time of his admission—he ate what he believed to be some meat that may not have been untainted, and two hours later became nauseated, vomited, and had abdominal pains. This was immediately followed by the diarrhea, which continued up to the time that I saw him, three months later. The examination disclosed the presence of pus, blood, and mucous in his diarrheal bowel movements; and upon the direct examination of the bowel from below, using what is known as a proctoscope it was possible to see that the lining of the bowel was diseased, there being a diffuse, acute inflammation of the bowel."

31 After reading from the record the doctor then testified:

"A diagnosis of ulcerated colitis was made. Mr. Wells was put under appropriate treatment, remained in the hospital from the 9th of July until the 22nd of September, and left the hospital greatly improved, the improvement in the condition being not a matter of theoretical assumption, but proven by the clearing up of pus, blood, and mucous in the stools; and upon direct inspection of the mucous membrane of the bowel by a proctoscope, as my records here before me show, the inflammatory condition had almost entirely cleared up."

10. Dr. Brown, between July and September, 1920, explained the nature of his ailment in detail. He told decedent—

"That he had an ulcerative colitis, the nature of which I explained to him as an infection of the wall of the large intestine, involving the entire extent, probably, of the large intestine of what we speak of as a diffuse process. In other words, one not localized to a small area in the bowel wall, but involving the entire extent of the large bowel, and causing redness, swelling, and ulceration of the lining of the bowel, with the pouring out of pus and blood and dysenterylike process."

According to the doctor, decedent "must have known it was a form of dysentery, because he actually had dysentery. Any layman would know he had dysentery. He was having eight, ten, or twelve bowel movements a day."

Dr. Brown told decedent "he would get well."

The treatment for ulcerative colitis is—

"Complete rest in bed, a very bland type of diet and heat on abdomen, certain drugs which have a soothing effect upon the bowel, and also certain other drugs which we introduce into the bowel in enemas, designed to affect the infection existing in the bowel causing the inflammation."

11. Shortly after the decedent entered the Presbyterian Hospital his business associate, Marshall B. Lloyd, asked him if he had made any arrangements or signed any documents or agreements with his second wife, Katherine Wells, with reference to the division of the property after his death. Decedent said that he had no such agreement but that he was leaving $100,000 in money to his second wife by his will. He told Mr. Lloyd to have the agreement drawn up. The agreement was drawn by Mr. Isaac B. Lipson, an attorney in Chicago; and, though it is undated except for the year 1920, it was executed at the hospital between July 9 and September 22, 1920. This agreement was made between John W. Wells and Katherine Wells and opens with the recital:

"By reason of the illness of John W. Wells the parties desire to make an agreement with respect to the inheritance of Katherine Wells from her husband and her share in his estate; that the parties are agreed that Katherine Wells should have $100,000 in money and certain other property in lieu of her statutory and dower rights."

By the agreement Katherine Wells, decedent's wife, ratified all gifts theretofore made by the decedent to his children and all gifts which might be made to his children thereafter "and before his death whether any of such gifts be made in contemplation of his death, or otherwise."

32 12. The postnuptial agreement between the decedent and his wife contained this further provision:

"And the said John W. Wells agrees and contracts with the said Katherine Wells to make, execute, and leave a last will and testament providing for the said Katherine Wells in accordance with the foregoing agreement."

In carrying out this provision, Mr. Lloyd again acted for the decedent. He (Lloyd) gave Mr. Lipson the provisions to be incorporated in the decedent's will, exhibiting to him also a will previously made by the decedent. The provisions of the new will differed only slightly from those of the earlier will. This will so drafted by Mr. Lipson was signed by the decedent in the presence of witnesses on August 18, 1920. A copy of it is made an exhibit to the petition in this case. After providing for the payment of $100,000 to his widow, granting her the use of the family homestead for her life, and bequathing to her certain personal property, the decedent devised his residuary estate to his five children with the following proviso:

"Provided, however, that the amounts shown to be due me from each of my children severally in accordance with my books at the time of my death, shall be considered advancement made by me to

them from time to time and shall be chargeable to each of them severally as advancements and shall be deducted from their respective shares."

13. On September 14, 1920, decedent, while at the hospital wrote to his son Ralph W. Wells, who was in England:

"The doctors say that I will be absolutely cured if I am careful for two or three months after leaving and I certainly will be careful after this."

On September 16, 1920, Dr. Shambaugh, according to the hospital record, found "very marked evidence of hyperplastic ethmoiditis, sinusis sinophisi, and concluded—

"There is very likely a close relationship between the ethmoiditis in this case and the asthma."

Owing to the age of the patient, Dr. Shambaugh did not feel like urging an operation. Ethmoiditis is an inflammation of the ethmoid cells which are connected with the nasal cavity.

14. On September 22, 1920, decedent was discharged from the Presbyterian hospital in an improved condition, and, according to Dr. Brown, decedent's condition was "excellent," though he had "not fully at that time recovered but he did within the next two or three months." When decedent left the hospital on September 22, 1920, according to Dr. Brown:

"His appearance was normal; he had gained an appreciable amount of weight, which is also a matter of record here, and he was in a very fair state of health."

15. At the time decedent returned to his home in Menominee on September 22, 1920, he had been almost nine months since January 4, 1920, during which time he had been in Florida, California, and the hospital in Chicago. During this nine-month period of absence his son Artemus had had, as in decedent's many extended absences in the past, full charge of the management of the business of J. W. Wells Lumber Company. In fact, in December, 1919, he had then been in active control of that company for quite a while.

22 The morning he returned he went into the office of his son, Artemus Wells, sat down in a chair, and told his son he was completely cured of the trouble that he had had and he felt good, but said he was going to be careful of what he ate.

16. After his return decedent resumed his normal business activities; viz, the management of the business of the J. W. Wells Lumber Company and other business affairs in which he was interested. His activities in the several companies in which he was interested continued up to the time of his death.

He was up at the office every day, around about the plant, doing about what he always did around there, attending to his correspondence, and such work.

These continued until he went away to California on February 3, 1921.

Decedent had been accustomed to spending the summers in Menominee and traveling in the winters during the latter years of his

life. He was usually in Menominee from about the first of May to the Christmas holidays. Decedent, for many years prior to his death, had a penchant for traveling. He visited not only many places of interest in this country, but also made several trips to foreign countries, including the Orient. In 1918 he acquired a cottage in California near Los Angeles, which he visited in the winters of 1918–1919, 1919–1920, and 1920–1921, remaining there several months on each occasion.

17. On October 30, 1920, decedent wrote his son Ralph W. Wells, who was then in England, in part as follows:

"I am around about the same as usual. Went to Iron Mountains to see Wells Hallenbeck day before yesterday, from there next day to Dunbar and on home. I feel as well as ever, and bowels seem normal, but doctor says I must diet and take Bismuth medicine for awhile and be careful. Gained 6 pounds since I came home. Wells Hallenbeck may have diabetes, and has taken Charles Wells as assistant, and will go to hospital. He can't sleep more than two or three hours at night, and is very nervous, has lost a good deal in weight."

18. The decedent was again admitted to the Presbyterian Hospital in Chicago for the third time on November 30, 1920. He did not tell his son, Artemus, that he was going again to the Presbyterian Hospital in Chicago for ten days on November 29, 1920, nor later when he went there again for four days on January 10, 1921. This third visit to the hospital was for the purpose of an operation to relieve his asthma. When Dr. Brown saw him again on November 30, 1920—

"He was in good general condition, except for some recurrence of trouble with his asthma, and he came to the hospital for treatment of the asthma, not for the bowel trouble. In fact, it was by arrangement when he left the hospital in September that he came back at this time, in November, to have the operative work done on the nose that was designed to clear up the asthma."

On November 30, 1920, an operation was performed by Dr. Shambaugh, which is described as a submucous resection of the deflected nasal septum, followed by complete exenteration (scraping out of the cells) of the ethmoid on the left side. On December 1, 1920, the hospital records show the doctor's medicine orders were as follows:

34 "Sodium bromide, grains, 10; potassium iodide, grains, 5; four times daily. Calcium phosphate, calcium carbonate, and bismuth subnitrate, each, grains, 20; five times daily."

Bismuth subnitrate is a part of the powder given for an irritable condition of the bowel. The doctor's order was "rest in bed," P. R. N. (meaning "when necessary"). Heat to abdomen, P. R. N., every alternate hour if in distress. On December 1, 1920, the record shows that the bowel movement contained some blood by delicate chemical tests, but no visible blood. It also shows that, on December 8, 1920, at 11.30 p. m., decedent had an asthmatic attack. On December 9,

1920, decedent was discharged from the hospital and returned to Menominee.

19. In December, 1920, the decedent spent considerable time working on his books of account. The books were kept at the offices of the J. W. Wells Lumber Company, at Menominee, Michigan. The decedent was preparing the necessary figures for the final equalization of the advancements he had made to his children from time to time during prior years.

On December 31, 1920, decedent came into the office of his son Artemus (which was also at the offices of the lumber company) with some stock certificates in his hand. These certificates, dated December 31, 1920, effectuated the transfer by him of 68,985 shares of the Girard Lumber Company to his children. The value of these shares at the date of decedent's death was $344,925. The son Artemus was secretary of this company and his father asked him to sign the certificates in that capacity. Thereupon the son signed the certificates and the transfers were completed immediately thereafter. On the occasion just mentioned the decedent also had in his hand several penciled statements of his accounts with his children. These were in the decedent's handwriting. They contained summaries of his accounts with each of his children, showing debit balances upon which interest had been computed by the decedent for equalization purposes. The total debit balances due from each of the children, appearing on the summary of these statements, after charging them with their respective shares of the Girard Lumber Company stock, were as follows:

Daniel Wells	$206,530
Artemus C. Wells	231,651
Ralph W. Wells	214,008
Mrs. Florence Law	216,445
Mrs. Edna Walsh	180,662

20. At the bottom of each of the pages on which the foregoing debit balances of the accounts of decedent with his five children are endorsements, all in decedent's handwriting, all dated January 1, 1921, and all signed by him, respectively, as follows:

(1) Account with his son Artemus C. Wells.

"This account is cancelled and the ledger is balanced to date as a gift."

(2) Account with Edna Wells (Mrs. Walsh).

"This account is cancelled and ledger balanced to date as a gift to Edna."

(3) Account with Florence Wells (Mrs. Law).

"This balance is made a gift to Florence and ledger account is balanced to date, $216,445.16."

35 (4) Account with Ralph W. Wells.

"Gift to Ralph. See adjustment of accounts between all on separate sheets."

(5) Account with Daniel Wells.

"This balance is made a gift to Dan and ledger account is balanced to date."

Shortly thereafter decedent gave to the Corn Exchange National Bank of Chicago a statement of his financial condition as of December 21, 1920, on which he had penned in red ink; "I have made presents to my family of large amounts of stocks and cash for several years. J. W. Wells." In this statement the stocks transferred to his children on December 31, 1920, are not included.

21. On January 10, 1921, decedent returned for the fourth time to the Presbyterian Hospital in Chicago. Dr. Brown saw decedent on that day and made this entry on the hospital record with reference to his condition:

"In general feels very well. Gained six pounds in weight. Asthma has been somewhat troublesome at times. Has had very good bowel function. No pain. Returns for completion of nasal operation."

The hospital record of his ailment at that time reads:

"Chronic ethmoiditis, chronic asthma; results, improved."

Ethmoiditis is an inflammation of the ethmoid cells which are connected with the nasal cavity.

On January 10, 1921, the hospital record also shows that the doctor's diet order was bland diet plus potatoes, vegetables, purees, oranges, and grape fruit. The orders for medicine for the decedent were "calcium carbonate, calcium phosphate, bismuth, subnitrate, each grains 20, five times daily. Adrenalin minims 10 * * * hypo for asthmatic attack." The calcium carbonate and calcium phosphate and bismuth subnitrate were for the bowels.

On January 11, 1921, Dr. Shambaugh again operated on decedent, the entry on the hospital record being: "Exenteration of ethmoid labyrinth, using Hartman biting forceps." That is an operation on the ethmoid cells. The doctor scraped the mucous membrane just back of the root of the nose in the forward part of the floor of the cranium. The hospital record also shows under date of January 10, 1921, that decedent's "asthma has been somewhat troublesome at times" and under date of January 13, 1921, the nurse's record shows: "1.30 a. m., usual asthmatic attack, unable to sleep." On the following morning, January 14, 1921, at 2.30 a. m., the nurse's record shows "usual asthmatic attack, adrenalin minims 10, hypo given with relief."

The hospital record shows that on January 14, 1921, there was "a small amount of mucous with blood in the stool." Dr. Brown examined decedent on that day and found "a very greatly improved condition" and that in respect of the ulcerative colitis it was "90 per cent normal." The decedent was discharged on January 14, 1921, with instructions to resume a blood builder and to keep up the former bland type of diet for the benefit of the intestines.

22. In the process of equalizing as of January 1, 1921, the advancements made to his children, the decedent had charged each of
36 his children with shares of the capital stock of the Lloyd Manufacturing Company, a Michigan corporation, as follows:

	Shares
Daniel Wells	228
Artemus C. Wells	576
Ralph W. Wells	750
Mrs. Walsh	1,086
Mrs. Law	818

These shares, however, were not delivered to the children, as it appears that the decedent had agreed to exchange them for a like number of shares of the capital stock of the Heywood-Wakefield Company, if, as, and when the Lloyd Company should be merged with the Heywood Brothers and Wakefield Company, also a New Jersey corporation, the resulting corporation to be known as the Heywood-Wakefield Company. Marshall B. Lloyd was interested with the decedent in the Lloyd Company.

23. On January 26, 1921, decedent entered into a trust agreement with Marshall B. Lloyd, of Menominee, Michigan, as trustee, for the benefit of his wife and five children, by which he transferred to him as trustee 3,713 shares of the capital stock of the Lloyd Manufacturing Company and at the same time delivered to him, assigned in blank, the certificates for said shares, which the trustee agreed should be transferred upon the books of the company to the name of "Marshall B. Lloyd, as trustee for the beneficiaries of J. W. Wells (his wife and five children) under a trust agreement dated January 26, 1921." (These shares were of the stipulated value of $334,170, as of the date of decedent's death.) The trustee was authorized to exchange for each share of the outstanding common stock of the Lloyd Manufacturing Company one share, par value $100, of the second preferred stock of a Massachusetts corporation to be organized and to assign, transfer, and deliver the certificates of the Lloyd Company to the Massachusetts corporation or its nominee and to accept certificates of the latter to be issued in exchange. (The corporation was organized as the Heywood-Wakefield Company.) The agreement further provided that within sixty days after the delivery to the trustee of the second preferred stock of the Massachusetts corporation in exchange for the shares of the Lloyd Manufacturing Company, held by him as trustee, the trustee should assign and deliver the shares of the second preferred stock of the Massachusetts corporation so received by him to decedent's beneficiaries, as follows: Florence Law (his daughter), 818 shares; A. C. Wells (his son), 576 shares; Daniel Wells (his son), 228 shares; Edna E. Walsh (his daughter), 1,086 shares; Ralph Wells (his son), 750 shares; and Katherine E. Wells (his wife), 255 shares. The agreement further provided that in the event the exchange of shares should not be consummated before December 1, 1921, the trustee should thereupon assign and deliver the shares of the common stock of the Lloyd Manufacturing Company held by him as trustee to the beneficiaries of the decedent, as follows:

To Florence A. Law, 818 shares; to A. C. Wells, 576 shares; to Daniel Wells, 228 shares; to Edna E. Walsh, 1,086 shares; to Ralph

W. Wells, 750 shares; and to Katherine E. Wells, 255 shares, of such capital stock.

37 24. On January 26, 1921, the same date as the trust agreement, decedent wrote to his son Ralph, then in England, in part as follows:

"Dick McLean died about three weeks ago. I think that if he had taken care of himself and dieted carefully that he might have lived for some time * * *.

"Farmlof, the builder, died from an operation lately. The doctors pronounce me cured of bowel trouble, but I will always have asthma. I weigh 140 stripped. Enough. We leave for West on 29th.

"Weather mild right along. Ice is drifting around bay.

"I am going to divide Lloyd pref. stock and most of G. L. Co. (Girard Lumber Co.) among you children at once so you will have enough to keep you from hunger at least. I own now 5,102 Lloyd stock, $100 per share. Income, $35,721. I am going to even up my gifts to all now, and the following is the way they stand before evening up:

Art	$231,651
Dan	299,539
Edna	180,662
Florence	207,445
Ralph	175,356
	1,093,644

"I have charged all of you interest on your accounts at 5% and I have charged you and Art $50,000 apiece for motor loss and credit you for W. P. L. Co. stock charged you.

"I am mighty busy getting ready for the West, so good-by."

25. On February 3, 1921, decedent left for California. Before leaving he wrote his daughter Edna Walsh, as follows:

MENOMINEE, MICH., *Feby. 3, 1921.*

MY DEAR EDNA: We leave to-day for sunny California, although Cal. has nothing on Menominee this far.

I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had, and how I equalized your a/cs by giving stock to even.

Your Lloyd stock will be delivered as soon as the deal is closed, which will be very soon. Your Lloyd stock is worth $108,000 and the Girard stock is worth $252,000, so you need not take in washing for support unless you throw it away on copper or other junk.

In making out these accounts, the thing that seems most important is how interest runs up. Good safe bonds are the best investment for a person who does not understand business.

Well, my dear girl, take good care of this, remember the poor and needy, and you will receive your reward.

Good-by.

FATHER.

On February 3 or 4, 1921, Dr. Brown saw decedent on his way to California, and described his condition as follows:

"He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his
38 asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis. As a matter of fact, my statement to him was justified by the fact that since he had left the hospital the preceding September, a matter of practically four months, he had enjoyed as normal a bowel function, I suppose, as the average man."

26. Some time in February, 1921, James A. Hamilton, manager of the Hamilton Machinery Company, of Menominee, and his wife were in Los Angeles, California. He had known decedent since 1899. While at Los Angeles he saw the decedent six times and spent three days with him. They had dinner at decedent's residence. Decedent took them in his automobile all around the city, and on Saturday, February 19, 1921, took them in his car up in the mountains. They would start at nine or ten in the morning, have lunch at some place at two or three o'clock, and return about five o'clock. Decedent drove the car himself through the congested portion of the city, as well as around or over the mountains near that city. At places on these mountain roads the automobile party driven by the decedent traversed roads that ran along a precipice where there is a sheer fall of six or seven thousand feet without any apparent concern or distress on the part of decedent. Hamilton did not see any difference in his (decedent's) appearance. He seemed to be just as spry as he ever was, and handled the car in pretty good shape. Hamilton also thought he was very cheerful.

27. In a letter dated February 21, 1921, written at Los Angeles, California, addressed to "My dear children," decedent wrote in part as follows:

"We had Ed Lindsly and Maud, and Mrs. Blesch and sister to dinner last week, and hardly a day goes by without some Menominee people call. I took Jim Hamilton and wife out on a mountain drive Saturday. We were over to see the Saffords yesterday. They leave for San Diego to-day and will stay until they sail for France in May. * * *

"I suppose you know that Ed Daniell had cancer in the jaw or neck. I heard to-day that the doctors pronounce him cured, which seems to be too good to be true, and seems to be too early to be sure, especially when it is in such a vital place. I am about free of my

bowel trouble, but have my old complaint, asthma, but I have taken treatment at Batch Creek Treatment Rooms here the last two years and they have cleared it up and they are now treating me and it is clearing up."

28. On April 6, 1921, Lloyd, the trustee, under the trust agreement of January 26, 1921, distributed to decedent's children and decedent's wife certificates for the shares of stock in the Heywood-Wakefield Company to which they were respectively entitled. The equalization of decedent's gifts to his children was thus completed by these transfers on that day, though decedent had actually divested himself of all interest in the 3,713 shares of Lloyd Manufacturing Company stock when he transferred them on January 26, 1921, to Lloyd as trustee under the trust agreement of that date. The stipulated value of the stock so transferred by decedent to his wife and children as of the date of decedent's death is $334,170.

39 29. While in California, about the middle of April, 1921, the decedent had a recurrence of the ulcerative colitis. He consulted Dr. Fred Speik, an outstanding man in internal medicine in Los Angeles, California, who had been previously associated with Dr. Ralph Brown. Dr. Speik considered the process an ulcerative colitis, and so treated him for some weeks. Because Mr. Wells was not doing well under his treatment he finally X-rayed his bowel, and told Mr. Wells that he feared he might have a cancer, and advised an operation, whereupon Mr. Wells telegraphed Dr. Brown that he was coming at once to Chicago, and this he proceeded to do, bringing these X-ray films with him.

30. On June 5, 1921, decedent reentered the Presbyterian Hospital in Chicago for the fifth time. "At the time of his arrival * * * he was a pretty sick man. He was having a terrific dysentery."

The condition proved to be due to a very virulent form of an infection that did not yield to treatment. Finally it became apparent that the best hope for saving his life would be to perform a simple operation, designed to prevent bowel material from flowing through the large intestine over this ulcerated surface. The operation was performed on the 10th of August, 1921, by Dr. Arthur D. Bevan.

Decedent continued to lose ground and died on the 17th of August, 1921. The decedent died as a result of an infection of the large intestine, producing what we call ulcerated colitis, death resulting from the combined effects of the sepsis and the exhaustion incident to the terrific dysentery. On the day of decedent's death an autopsy was performed which disclosed the characteristic findings that had been diagnosed during life, namely, a very severe and extensive inflammation of the large intestine, with ulceration of the bowel. No trace of cancer was found.

31. The death certificate signed by Dr. R. C. Brown on August 17, 1921, and on the same day filed with the Chicago Department of Health, sets forth the cause of decedent's death as "suppurative colitis" and its "duration 1 yr."

32. After the death of the decedent, plaintiffs as executors of his estate filed with the Bureau of Internal Revenue the estate-tax return of his estate wherein they reported a net estate, for Federal estate-tax purposes, of $883,485.08. It was shown in the return that certain transfers had been made by the decedent to his children, within two years of his death, but the property so transferred was not included in the taxable estate because the executors claimed in the return that the transfers were not made in contemplation of death. This estate-tax return was audited by the Bureau of Internal Revenue and several determinations, tentative and final, were made by the bureau of the estate-tax liability of the decedent's estate. The final determination of the Bureau of Internal Revenue was that there should be included in the estate subject to the estate tax the following shares of stock of the values stated below, transferred by the decedent to his children, within two years of his death, because of the determination by the bureau that these transfers were made by the decedent in contemplation of death:

1,220 shares of the capital stock of the J. W. Wells Lumber Co	$103,808
68,985 shares of capital stock of the Girard Lumber Co	344,925
3,713 shares of the capital stock of the Heywood-Wakefield Co	334,170
Total	782,903

40 Such determination having been made, the Bureau of Internal Revenue, shortly after September 29, 1923, assessed additional estate taxes against plaintiffs in the amount, as finally reduced, of $83,410.90. This amount, with interest of $4,842.47, total $88,253.37, was paid by the executors to the collector of internal revenue on May 28, 1924. The basis of such additional taxes was the determination by the Bureau of Internal Revenue that the decedent had on December 24, 1919, and January 1 and 29, 1921, transferred the shares of stock listed above, of the aggregate value of $782,903, to his children and wife in contemplation of death.

33. On July 2, 1924, plaintiffs filed with the collector of internal revenue their refund claim for $88,253.37, wherein they sought the refunding of the additional estate taxes with interest paid to the collector of internal revenue as stated in the next preceding finding. The basis or ground set forth in the refund claim was that the Bureau of Internal Revenue had erred in holding that the transfers in question were made in contemplation of death and were therefore properly to be included in the taxable estate. Upon audit, plaintiffs' refund claim, on October 18, 1924, was allowed in the amount of $4,616.15 (due to an adjustment not material here), and rejected in the amount of $83,688.62. In his letter of rejection the Acting Commissioner of Internal Revenue ruled that "the transfers were made in contemplation of death and were properly included as a part of decedent's gross estate, and no further adjustment thereof is herein made." The total taxable estate of the decedent, as found by the Bureau of Internal Revenue in its final determination, was $1,664,217.61, which included $782,903, the value of the

above-mentioned shares of stock transferred by the decedent to his children.

34. Plaintiffs are the duly appointed, qualified, and acting executors of the estate of John W. Wells, deceased. Plaintiffs and their decedent are and have always been citizens and residents of the United States. They and their decedent have always borne true faith and allegiance to the Government of the United States and have in no way aided, abetted, or given encouragement to rebellion against said Government. Plaintiffs are and have at all times here involved been the sole and absolute owners of the claim presented in this action, and have made no transfer or assignment of said claim, or any part thereof, or of any interest therein. There are no set-offs or counter-claims against the same in favor of the United States. No action has been had on said claim in Congress or by any of the departments of the United States Government except by the Bureau of Internal Revenue as hereinbefore stated.

35. The transfers, made within two years of decedent's death, upon which the tax involved in this action was imposed, were made by decedent as follows:

In December, 1919, he transferred and delivered to his sons, Daniel Wells and Artemus C. Wells, 416 shares of the capital stock of the J. W. Wells Lumber Company. By reason of a stock dividend subsequently declared, these shares were increased to 1,280 shares at the date of the decedent's death. Their stipulated value is $103,808.

41 On January 1, 1921, he transferred and delivered to his children 68,985 shares of the Girard Lumber Company of the agreed value of $344,925.

On January 26, 1921, he placed in trust 3,713 shares of the capital stock of the Lloyd Manufacturing Company, to the end that this stock might be exchanged for stock of the Heywood-Wakefield Company and then that the Heywood-Wakefield shares received in exchange might be delivered to his children. The agreed value of this stock was $334,170.

36. The value of decedent's estate at the time of his death, excluding the value of the transfers above mentioned, was $881,314.61, on which the decedent's annual income was approximately $50,000 per annum. The total value of the shares, transferred as above mentioned in Finding 35, aggregated $782,903. The transfers were of a material part of decedent's property.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of $83,683.62, with interest as provided by law.

It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of eighty-three thousand six

hundred eighty-three dollars and sixty-two cents ($83,683.62), with interest at the rate of six per cent per annum from May 28, 1924, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

Opinion

WILLIAMS, Judge, delivered the opinion of the court:

This is a suit brought by the executors of the estate of John W. Wells, deceased, to recover the sum of $83,683.62, with interest thereon, which amount, it is alleged, was illegally assessed and collected as Federal estate taxes by the Commissioner of Internal Revenue under the revenue act of 1918.

The decedent was a resident of the State of Michigan. He was a man of strong character who had by his own efforts and industry accumulated a considerable fortune. When a young man he moved from Iowa to Michigan, where he became interested in the business of acquiring and selling timber lands and manufacturing lumber, in which business he continued up until the time of his death and out of which he accumulated his fortune.

The decedent was the father of five children, three sons and two daughters, who survived him. In 1901 he began to make advancements of money and other property to his children. He kept a set of books in which the transfers of property and money to his children were recorded.

The decedent often expressed the opinion that the proper thing for a man of wealth to do was to give his children substantial sums of money while he was yet living that they might have the
42 experience in handling it while they had a father to counsel with and give advice.

The decedent and the late Senator Stephenson, of Wisconsin, who died about the year 1918, were associated together in the lumber business and were close friends. It seems that Senator Stephenson was not so liberal in the matter of making gifts to his children as was the decedent. Decedent often discussed the policy pursued by Senator Stephenson with this children and expressed the opinion that he was making a great mistake in not giving property to his children while he was living to help them handle it properly and said, "That is not my policy."

Between the time decedent began making advancements to his children in 1901 and the date of his death, August 17, 1921, he had transferred to them in money and property, including interest accrued on such gifts, $1,397,814. Of this amount $782,903 had been transferred within two years prior to his death as follows:

(1) In December, 1919, he transferred and delivered to his sons, Daniel Wells and Artemus C. Wells, 416 shares of the capital stock of the J. W. Wells Lumber Company. By reason of a stock dividend, subsequently declared, these shares were increased to 1,280

shares at the date of decedent's death. Their stipulated value is $103,870.

(2) On January 1, 1921, he transferred and delivered to his children 68,985 shares of the Girard Lumber Company of the agreed value of $344,925.

(3) On January 26, 1921, he placed in trust 3,713 shares of the capital stock of the Lloyd Manufacturing Company to the end that this stock might be exchanged for stock in the Heywood-Wakefield Company and then the Heywood-Wakefield shares received might be delivered to his wife and children. The agreed value of the property transferred as aforesaid is $782,903.

After the death of decedent the plaintiffs as executors of his estate filed with the Bureau of Internal Revenue an estate tax return wherein the shares of stock transferred as aforesaid were not included in the net estate subject to Federal estate taxes. Upon an audit of the return by the bureau the commissioner determined and held that the shares of stock so transferred, within two years prior to the death of decedent, were transfers in contemplation of death and were subject to the tax. Consequently $782,903, the value of said stocks, was added to the taxable estate, upon which plaintiff paid an additional tax in the amount of $83,693.62, which tax is the basis of this suit.

The taxes in question were assessed under the revenue act of 1918. The relevant part of which provides as follows:

"Sec. 401. That * * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act. * * *

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *.

43 "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

The gifts in question were undoubtedly a material part of decedent's property and were in the nature of a final distribution or disposition of such property, without a fair consideration in money or money's worth, and having been made within two years prior to

decedent's death, a presumption arises under the statute that such gifts were made in contemplation of death. The presumption created is one of fact, to overcome which the burden of proof is on the plaintiff.

The words "contemplation of death," have been construed many times in both State and Federal courts and have come to have a distinctive meaning. In Spreckles v. State, 30 Cal. App. 363, 158 P. 349, the court said:

"A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden, or, as counsel for the respondents with singular aptness states the proposition: 'It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be subjected to the tax.' That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer."

In Shwab v. Doyle, 269 Fed. 321, the Circuit Court of Appeals said:

"On principle, and without reference to authority, the ultimate question concerns the motive which actuated the grantor; that is to say, whether or not a specific anticipation or expectation of her own death, immediate or near at hand (as distinguished from the general and universal expectation of death some time), was the immediately moving cause of the transfer."

This court in the case of Meyer v. United States, 60 C. Cls. 474, construed the words "contemplation of death" as follows:

"A review of the authorities is scarcely necessary to sustain the proposition that the contemplation of death referred to in the statute is not that contemplation of death which must be present with all of us, mindful of its certainty at some time, we know not when, but it is that state of mind which by reason of advanced age, serious illness, or other producing cause induces the conviction that death in the near future is to be anticipated. If it be said that there need not be a conviction that death is imminent, there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events. And in this state of mind,
in this belief in the near approach of death, must be found the
44 motive for the conveyance if it is properly to be characterized as made in the contemplation of death.

"The question necessarily involves the determination of a mental state, and that, too, the mental state at a given time of one who, at the time the question is for determination, has passed from life. The difficulties are therefore apparent. In the absence of proof as to express declarations of the decedent—seldom, we may assume, available to the Government—the burden of affirmative proof could but rarely, if ever, be successfully assumed; and wisely, therefore, and perhaps of necessity also, the law has relieved the Government,

under the condition stated, of the burden and created the presumption.

"But what is the result? Can it go further than to shift the burden of proof, leaving the presumption to prevail in the Government's favor in the absence of a reasonable showing to the contrary? Taxing statutes, when of doubtful interpretation, are always to be construed in favor of the taxpayer, and the spirit of this rule must be completely ignored if, in determining a question of fact as between the Government and the taxpayer, rigorous rules as to the proof required to overcome the presumption of the law are to be applied. For if the Government was deemed entitled to a presumption in its favor because of the difficulties of proof, it is to be borne in mind that even though a conveyance was in fact not in any degree made in contemplation of death, the personal representatives might and frequently would be beset by many difficulties in proving that negative fact. Circumstances must largely be relied upon, and these should be fairly—indeed, we think liberally—construed in favor of the taxpayer."

In Rea v. Heiner, 6 Fed. (2d) 389, 392, the court said:

"There is a common agreement that the words 'contemplation of death' mean not the general knowledge of all men that they must die; that it must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand; and that, so arising, it must be the direct and animating cause, and the only cause, of the transfer. If this apprehension, so arising, is absent, there is not that contemplation of death intended by the statute, especially when another adequate motive actuating the gift is shown."

The Board of Tax Appeals in Starck, Executor, 3 B. T. A. 514, construed the meaning of the term "contemplation of death" as follows:

"In determining whether a transfer is made in contemplation of death, the board must look to the expressions of the decedent, to the outward visible acts and circumstances surrounding a transfer of property prior to death: * * * An act may well be performed in contemplation of death at some time in the future and yet not be in contemplation of death within the meaning of that phrase as used in the statute. The intention of Congress in the enactment of section 402 of the revenue act of 1918 was to provide for the inclusion in the gross estate of the value of any property concerning which the decedent made a transfer, except for a fair consideration in money or money's worth, in contemplation of death within a reasonable time in the near future, as distinguished from the general expectation of death entertained by everyone."

45 The board has since in a long line of well-considered decisions, too numerous to cite, reaffirmed the rule announced in Starck, Executor, supra, and has uniformly applied such rule to the facts presented in cases arising before it in determining whether or not transfers in question were made in contemplation of death.

The question to be decided is whether or not the presumption raised by the statute that these transfers were made in contemplation of death has been overcome by proof adduced on behalf of plaintiffs. It is our opinion the presumption is overcome as to each of the three transfers, and that the plaintiffs have succeeded in establishing affirmatively and conclusively that such transfers were not made in contemplation of death within the meaning of the statute. We have no difficulty in reaching this conclusion as to the transfer made in December, 1919, in which decedent delivered to his sons, Daniel Wells and Artemus C. Wells, 1,280 shares of the J. W. Wells Lumber Company, of the value of $103,808. At the time this transfer was made the decedent, aside from a case of aggravated asthma from which he had suffered at intervals for three or four years prior thereto, was, so far as he knew, in perfect health. He had not consulted a physician prior to that time for any ailment other than for asthma, which, while annoying, was not regarded by him as at all serious.

His son Artemus had for some time been in the active management of the J. W. Wells Lumber Company and the moving cause for the gift of stock to him was a recognition of the efficient service he had rendered the company and the desire of decedent that he might have a substantial financial interest in the company. The transfer was also made in the furtherance of the policy long adopted by decedent in the matter of making gifts and advancements to his children, which motive will be considered further in discussing the two subsequent transfers. That the decedent at the time of the making of this transfer either anticipated or expected his own death in the immediate or not far distant future is negatived by all the facts and circumstances surrounding the making of the transfer, and by the undisputed proof in the record.

The transfer of the shares of stock of the Girard Lumber Company made on January 1, 1921, and the transfer of the shares of stock of the Lloyd Manufacturing Company, January 26, 1921, were made under different conditions than was the transfer of December, 1919, and present a much closer question.

Decedent spent the latter part of the winter and early spring of 1920 at his winter home in California. About the middle of April he had a severe attack of intestinal trouble. In June of that year his physician in California advised him that he was suffering from cancer of the intestines. Shortly thereafter he left California and went to Chicago, where on July 9th he entered the Presbyterian Hospital. He immediately consulted Dr. Ralph Brown, a specialist in bowel diseases. Dr. Brown diagnosed his case and informed the decedent that his ailment was that of ulcerative colitis, and that he did not have cancer. Dr. Brown further informed him that he would get well. He remained in the hospital from July 10th to September 22d, under the care and treatment of Dr. Brown, at which time he was discharged from the hospital in a greatly improved con-
46 dition. His appearance was normal; he had gained an

appreciable amount in weight, and was advised by Dr. Brown that his condition was excellent.

Upon his discharge from the hospital in September he returned to his home in Michigan; assured his son Artemus Wells, who had been in charge of the J. W. Wells Lumber Company during his absence, that he was completely cured of his trouble and that he felt good, but said that "he was going to be careful of what he ate." He resumed his normal business activities, was at the office of the Wells Lumber Company every day; attended to his correspondence, worked on his books, and was apparently in his usual health. He visited with his friends as usual and made one or two business trips outside the State.

On October 30th he wrote his son Ralph, who was then in England, saying:

"I am around about the same as usual. Went to Iron Mountain to see Wells Hallenbeck day before yesterday, from there next day to Dunbar and on home. I feel as well as ever, and bowels normal, but doctor says I must diet and take Bismuth medicine awhile and be careful. Gained 6 pounds since I came home."

He returned to the Presbyterian Hospital on November 30th and underwent an operation for his asthmatic trouble. Dr. Brown saw him on November 30th and pronounced him in good general condition except for some recurrence of trouble with asthma. He left the hospital December 9, 1920, and returned to his home in Michigan. Following his return home he spent considerable time working on his books of accounts at the J. W. Wells Lumber Company's office. On December 31st he executed the transfer of 68,985 shares of stock of the Girard Lumber Company to his children. His son Artemus was secretary of this company, and when his father asked him to sign the certificates in that capacity in order to effectuate their transfer he demurred, and said to his father: "We have all we need. I don't think I would do that." To which the decedent replied: "Well, I have got all that I need, too, and I want to be relieved of the responsibility of looking after this property, and I think you children should take it up." Artemus thereupon signed the certificates and the transfer was completed. On this occasion the decedent had in his hand several penciled statements of his accounts with his children. These statements were in his own handwriting and contained summaries of his accounts with each of his children showing debit balances upon which interest had been computed by the decedent for equalization purposes. The total debit balances due from each of the children appearing upon the summary of these statements, after charging them with their respective shares of the Girard Lumber Company stock, were as follows:

Daniel Wells	$266,530
Artemus C. Wells	231,651
Ralph Wells	175,356
Edna Walsh	180,662
Florence Law	207,444
	1,063,644

On January 26, 1921, the decedent executed certain trust instruments whereby 3,713 shares of the capital stock of the Lloyd
47 Manufacturing Company were assigned in trust, to be exchanged for an equal number of shares in the Heywood-Wakefield Company, which were in turn to be delivered to his wife and children as follows:

Florence Law (daughter), 818 shares; A. C. Wells (son), 576 shares; Daniel Wells (son), 228 shares; Edna Walsh (daughter), 1,086 shares; Ralph W. Wells (son), 750 shares; and Katherine E. Wells (his wife), 255 shares.

In a letter written to his son Ralph, who was still in England, he explained the transfer and distribution of the Lloyd Manufacturing stock as follows:

"I am going to divide Lloyd pref. stock and most of G. L. Co. (Girard Lumber Co.) among you children at once so you will have enough to keep you from hunger at least. I own now 5,103 Lloyd stock, $100 per share. Income, $35,721. I am going to even up my gifts to all now."

In the same letter the decedent said:

"The doctors pronounce me cured of bowel trouble, but I will always have asthma. I weigh 140 stripped. Enough. We leave for West on 29th: * * * I am mighty busy getting ready for the West, so good-by."

On February 3, 1921, before leaving for California decedent wrote his daughter Edna explaining to her the transfer of the Lloyd stock, as follows:

"I have been working on my books and evening up all your accounts. Dan, Art, and Ralph have had advances that were more than you and Florence had and I have equalized one with the other by charging each with what they have had and charging them interest on the account to date, and the inclosed sheet shows what each has had, and how I equalized your a/cs by giving stocks to even."

The decedent left his home in Michigan on February 3rd or 4th for his winter home in California. He stopped at Chicago on the way and saw Dr. Brown, who described his condition at that time as follows:

"He was vigorous and had an excellent color. He was having, and had had for months then, a normal bowel functioning. He was eating everything and, with the exception of the fact that his asthma had at that time not entirely cleared up, he considered himself well, and I told him that he need have no anxiety whatever about his state of health; that I considered him in excellent condition; that he need have no fears of any recurrence of the ulcerated colitis."

After his return to California the decedent apparently enjoyed his usual health, with the exception of the asthma, until late in the spring. During this time he entertained his friends at his home, took them for automobile rides in the city of Los Angeles and over

the mountain roads near by. His friends who had not seen him for some time saw no difference in his appearance. He seemed to them just as spry as he had ever been. About the middle of April, 1921, he had a recurrence of the ulcerative colitis, which not yielding to treatment, led decedent to return to Chicago and reenter the Presbyterian Hospital on June 5, 1921, where he underwent an operation on August 10th, and died on August 17th.

48 Applying these facts to the rule that the term "contemplation of death" does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death.

The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death but have definitely established the fact, that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

That this was the motive which actuated the decedent in making these transfers seems unquestioned. He repeatedly, in letters to his children and in statements to business associates at about the time the transfers were made, gave this as his reason for such transfers.

After the final transfer in which the advancements and gifts to the children were evened up in January, 1921, the decedent still possessed property of the value of nearly $900,000, from which he drew an annual income of approximately $50,000. At the time the transfers were made, decedent had no reason to believe otherwise than, aside from his asthma, he was, for a man of his age, in ordinary health. While he had gone through a most serious and painful illness, he had, as he believed, made an almost complete recovery. He was assured of this fact by his physician, an eminent specialist, in whom he had great confidence. The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business affairs, his letters to his children assuring them of his renewed health, show that he fully believed the assurances given him by his physician that he was cured and had nothing to fear on account of his former illness.

The presumption created by the statute that the transfers in question were made in contemplation of death can not stand against

ascertained and proven facts showing the contrary to be true. The best evidence of the state of the decedent's health at the time the transfers were made is the statement of his doctor. The best evidence of the decedent's state of mind at that time and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all the circumstances concerning the transfers. Decedent's physician says that at the time the transfers were made he was in normal health for a man of his age. The decedent in letters to his children and in statements to his friends repeatedly assured them he had recovered from his former illness and was again enjoying reasonable health. He also gave satisfactory reasons for making the transfers in question, which reasons are entirely consistent
49 with all the other facts and circumstances surrounding the transactions and with the policy followed by him for many years in dealing with his children.

It is urged on behalf of the defendant that the fact decedent during the time he was in the hospital, between July 10, 1920, and September 22, 1920, made and entered into a property agreement with his wife as to her share of his property, and made and executed at the same time a will in which the terms of the agreement made with his wife were carried out, and in which also provisions were made for his children, is a strong circumstance supporting the presumption that the two transfers of property made by him later were made in contemplation of death. While these transactions are entitled to consideration in connection with all the other facts and circumstances shown, we do not regard them as having a great deal of weight in determining the question as to the decedent's state of mind, and the motives actuating him in making transfers of property, four months later. No transfers of property were made to the children at the time of the execution of the property agreement with his wife, and the provisions made for their benefit in the will executed at that time were identical with the provisions of a former will. Whatever apprehensions the decedent entertained at the time of the making of the property agreement with his wife as to the chances of recovery from the illness from which he was suffering at that time, had ceased to exist before the transfer of the Girard Lumber Company stock on January 1, 1921, and the Lloyd Manufacturing Company stock on January 26, 1921.

We are of the opinion the three transfers in question were not made by the decedent in contemplation of death, and that the plaintiffs are entitled to recover the sum of $83,683.62, with interest thereon as provided by law from May 28, 1924, the date on which the taxes were paid. It is so ordered.

GREEN, Judge; GRAHAM, Judge; and BOOTH, Chief Justice, concur.

LITTLETON, Judge, took no part in the decision of this case.

50 V. *Judgment*

At a Court of Claims held in the city of Washington on the 7th day of April, A. D. 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are entitled to recover.

It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of eighty-three thousand six hundred eighty-three dollars and sixty-two cents ($83,683.62), with interest at the rate of six per cent per annum from May 28, 1924, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

51 [Clerk's certificate to foregoing transcript omitted in printing.]

C (Indorsement on cover:) File No. 35174. Court of Claims. Term No. 252. The United States, petitioner, vs. Artemus C. Wells et al., Executors of the Estate of John W. Wells. Petition for a writ of certiorari and exhibit thereto. Filed July 3, 1930. File No. 35174.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1930